IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TREMAYNE JAMONE REED, Appellant.	No. 36407-7-II PART PUBLISHED OPINION

Van Deren, C.J. — Tremayne Reed appeals his attempted first degree murder conviction for the 2006 shooting of a police officer. Reed argues that (1) the "to convict" jury instructions were improper, (2) the State failed to prove beyond a reasonable doubt that Reed acted with premeditated intent, (3) the trial court erred in failing to suppress the photographic identification of Reed, and (4) the trial court improperly imposed an exceptional sentence. The State concedes that the matter should be remanded for further sentencing proceedings. We agree with the State's concession and affirm Reed's conviction but remand for resentencing.

FACTS

On March 25, 2006, at approximately 12:23 am, Reed fired two shots at Puyallup Police Officer Gary Shilley in the parking lot of the South Hill Mall. One shot hit Shilley in the face.

Reed was arrested for, charged with, and convicted of first degree attempted murder (count 1) and first degree unlawful possession of a firearm (count II).

I. Shooting

At trial, Shilley testified that he was on his way to another call when he observed a red Jeep parked in the South Hill Mall parking lot. He thought "the vehicle was possibly broken down and somebody needed help." Report of Proceedings (RP) (Apr. 26, 2007) at 60-61. Shilley did not activate his emergency lights when he entered the parking lot because he "had no reason to." RP (Apr. 26, 2007) at 70. He "approached . . . head on and then turned to the left and circled around [the vehicle] before [he] came up behind it."[1] RP (Apr. 30, 2007) at 32. According to protocol, he "let dispatch know over the radio" that he had stopped. "[He] . . . gave dispatch the license plate number of the vehicle and . . . a description of the vehicle." RP (April 30, 2007) at 15-16. He also gave a description of the person standing outside the Jeep as a "young black male." RP (Apr. 30, 2007) at 20.

Before Shilley exited his vehicle to approach the Jeep, he "waited a second or two" and then "fixed [his] spotlight and looked down the driver's side of the vehicle." When he exited the patrol car, Shilley "closed the door, had [his] flashlight in [his] left hand . . . and walked up to . . . the driver's side of the vehicle." RP (Apr. 30, 2007) at 20-21. As he was walking toward the Jeep, he did not "say anything or attempt to make any verbal contact with the individual." RP (Apr. 30, 2007) at 24. Shilley testified:

[A]s I got to the driver's door, my best recollection, driver's door, driver's mirror,

[1] Shilley testified that he did not "stop alongside the Jeep at any time" and that he had no "recollection as to the person . . . coming over on foot to [Shilley's] patrol car." RP (Apr. 30, 2007) at 33. But the South Hill Mall surveillance videotape indicates that Shilley parked his patrol car almost parallel with the Jeep on the passenger side and the driver of the Jeep walked to the driver's side window of Shilley's patrol car at one point during the encounter.

> about there, all I remember at that point is a black silhouette jumping up from in front of the vehicle and a flash in my face. And it felt like somebody hit my face with a hammer, and my optic nerve was shut down at that point and I was blind.[2]

RP (Apr. 30, 2007) at 21. Shilley only saw a silhouette; he did not see the shooter's face. He testified that he did not deploy his gun or his stun gun at any point during the stop.

II. Investigation

The Jeep drove away and Shilley called for help over the radio. Puyallup Police Officer David Temple heard Shilley's radio dispatch and responded to the scene. When Temple arrived, he saw Shilley lying down on his elbows, "trying to hold himself up," with his head facing downward and a pool of blood on the ground. RP (Apr. 26, 2007) at 22. Temple asked Shilley what happened and Shilley responded, "'I've been shot. I've been shot.'" RP (Apr. 26, 2007) at 24. Shilley could not identify the shooter but said he was a black male. He told Temple that the shooter was driving a red Jeep Cherokee. Shilley was wearing a bullet proof vest. Shilley's gun and stun gun were still in their holsters and Shilley's emergency lights on his patrol car were not activated. Temple found a license plate number in Shilley's mobile data terminal. Temple gave the number to dispatch for broadcast and then he broadcast the make and model of the vehicle and "the racial description of the suspect." RP (Apr. 26, 2007) at 30.

On the morning of March 25 at approximately 12:05 am, Washington State Patrol Sergeant Thomas Olson was driving an unmarked police car to a Denny's restaurant located near the South Hill Mall to meet other officers. He testified, that, when he came to a stop at a stoplight,

> I observed a red SUV coming up over 512 toward the intersection going southbound on 9th Street. It was slowing so obviously its light had started to

[2] It appears from the surveillance video that actually Shilley was on the passenger side of the Jeep, rather than the driver's side.

> change. Mine turned green. As I slowly started to come through the intersection, I was looking to my left toward the vehicle. We were the only two vehicles in the intersection.
>
> . . . I looked at the driver and, immediately upon seeing him, we had locked eye contact. I found that kind of unusual.
>
> . . . [A]s I continued in front of the vehicle, I continued to look right at the driver, and we stayed in eye contact . . . all the way through my turn until I was out of sight we had complete eye contact all the way through the side window and as I passed him.
>
> The distance of separation between my vehicle and his was he was in lane two, which would be the inside lane of 9th Street. Then there's like an open turn lane there, and then I turned into the nearest lane, being the inside lane, to go northbound. So we had one lane separation between the two of us.

RP (May 14, 2007) at 12-13.

When Olson arrived at Denny's, he heard on the police radio that an officer was down. He and other officers began searching the area. While searching, he heard on the radio that the suspect was a black male driving a red SUV. That jogged Olson's memory about his earlier contact with the vehicle and driver and he realized that he may have just seen the suspect three to four minutes earlier. Olson and the other officers went to the scene of the shooting.

At the shooting scene, Olson looked at a booking photograph of the Jeep's registered owner. He knew immediately that the registered owner was not the person he had observed at the intersection. Olson testified that the registered owner was "either very light skin black or black mixed with Asian, but he was very light skinned."[3] RP (May 14, 2007) at 23.

Olson also looked at three or four photographs of Reed, who was the last person

[3] There is conflicting testimony regarding whether the registered owner of the red Jeep was male or female. It appears that the person in the booking photograph may have been someone associated with the registered owner.

associated with the Jeep.[4] Olson positively identified Reed as the person he had seen in the red SUV that morning. "There was just the shape of the face, and more so than anything else was his eyes. What I saw in his eyes as he stared at me going around the intersection to what I saw looking at the booking photo, it was definitely the same person." RP (May 14, 2007) at 24.

When dispatch relayed Reed's identification as the last known person associated with the Jeep, Pierce County Deputy Sheriffs, Trent Stephens and Gary Sanders, went to Reed's apartment complex. A Lakewood Police Department patrol unit also responded to the apartment complex. Stephens and Sanders approached the front door of the apartment complex while the Lakewood officers covered the back.

Stephens and Sanders knocked and announced that they were police officers. A woman, later identified as Courtney Cihla, answered the door and they asked her about the red Jeep. Reed appeared in the doorway and, upon request, Reed and Cihla admitted Stephens and Sanders into the apartment. Reed told the officers that he had purchased the Jeep from a woman named Catalina Atalig a few weeks earlier. He told them that he had been stopped by police a few nights earlier and that a friend was supposed to pick up his vehicle but never did. He said that he had been home "during the course of the" evening watching movies with Cihla. RP (May 1, 2007) at 31. Stephens and Sanders asked Reed if he would accompany them to the South Hill Precinct and he agreed.

Pierce County Detective Sergeant Todd Carr interviewed Reed at the police station.

[4] Reed had been stopped and cited a few days prior to the shooting by Washington State Patrol Officer Kelly Kalmbach. Kalmbach testified that she had stopped Reed in the red Jeep on the night of March 21, 2006, because he did not have his lights on. She cited Reed for driving while his license was suspended and did not allow Reed to drive the car from the scene. When Kalmbach left the scene of the stop, Reed was "attempting to make a phone call to have someone come and pick up the vehicle." RP (May 1, 2007) at 126.

Puyallup Police Officer Peter Bellmer found the Jeep, running and unoccupied, parked on a dimly lit street. In a search pursuant to a search warrant, Pierce County Forensic Investigator Mary Lou Hanson-O'Brien found three usable fingerprints in the Jeep that matched Reed's fingerprints. Reed was later charged with attempted first degree murder and first degree unlawful possession of a firearm.

Cihla testified that Reed was her ex-boyfriend. Approximately a month or two before the shooting, she and Reed had purchased a red Jeep Cherokee. A few days before the shooting, a state trooper stopped Reed and told him that, because he had a suspended license, he could not drive home. Contrary to Reed's statement to the police, Cihla testified that Reed walked home and that Reed's friend brought the Jeep home that same night.

The day before the shooting, Reed picked Cihla up from work in the red Jeep and they went together to help her aunt move. They returned to their apartment between 9:30 and 10:00 pm and Reed dropped off Cihla and left in the red Jeep.[5] When Reed returned home at approximately 12:00 or 12:30 am, he seemed upset. When Cihla asked him what was wrong, "He said that he shot a cop. . . . He said he didn't know [why he shot the cop]. He said that he was sorry and that he didn't know why he did it." RP (Apr. 30, 2007) at 130. Reed told her the car had broken down and that "he was underneath the hood looking to see what the problem was and the officer came up and was shining the light, asking for his registration, and he just freaked out."[6] RP (Apr. 30, 2007) at 131.

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[5] Cihla's mother told police that she had seen Reed in the red Jeep the day before the shooting incident.

[6] Cihla testified that Reed owned a gun and that he acquired the gun within a month before the shooting. Reed had the gun for protection because the couple had been harassed in the past.

III. Jury Instructions

In addition to the charged offenses of first degree attempted murder and unlawful possession of a firearm, the trial court instructed the jury on the lesser included offense of second degree attempted murder. The jury convicted Reed of first degree attempted murder and first degree unlawful possession of a firearm. The jury also returned two special verdicts: (1) that Reed was armed with a firearm at the time of the crime and (2) that Reed knowingly "commit[ted] the offense against a law enforcement officer who was performing his or her official duties at the time of the offense." Clerk's Papers (CP) at 116.

IV. Sentencing

At sentencing, the trial court asked Reed if he had anything to say.

[TRIAL COURT:] Mr. Reed, before sentencing is there anything you'd like to say?
[REED:] No.
[TRIAL COURT:] Mr. Shilley and his family are here.
[REED:] No.
[TRIAL COURT:] I know he'd like to hear something from you.
[REED:] No.
[TRIAL COURT:] Nothing at all after you --
[REED:] Nothing.
[TRIAL COURT:] -- shot a man in the face and --
[REED:] Nothing.
[TRIAL COURT:] -- nobody knows why? Anything you want to say about that?
[REED:] Nothing.
[TRIAL COURT:] Why did you do that? Anything you want to say about that?
[REED:] Nothing.
[TRIAL COURT:] I'm sorry?
[REED:] No comment. I have nothing to say.

RP (June 1, 2007) at 24-25.

The trial court found that "a departure from the sentencing guidelines is justified [because]

RCW 9.9A.535 . . . provides for departure if the victim is an officer performing his duties in the course of his duties and that was known to the defendant." RP (June 1, 2007) at 27. The trial court continued:

> [Reed] has shown no real reaction or remorse in this. He's not accepted responsibility for it. Even today he won't say he's sorry. It's very simple. Say you're sorry. He doesn't want to do that. It's important to Mr. Reed, apparently, to be seen as a tough guy or something. I don't know. Tough guys can say they're sorry when they injure someone who doesn't deserve it, and that's the case here.

RP (June 1, 2007) at 28-29. The trial court sentenced Reed to 480 months in prison for first degree attempted murder—with an additional 60 months for the weapons enhancement conviction—followed by 24 to 48 months of community custody. Reed received a concurrent sentence of 30 to 48 months confinement for first degree unlawful possession of a firearm.

Reed appeals.

ANALYSIS

I. Attempt "To Convict" Instruction

Reed argues that the "'to convict' instruction for attempted first-degree murder omitted

an essential element of the crime" when it failed to include the phrase "premeditated intent."[7] Br. of Appellant at 25 (emphasis omitted). "The failure to instruct the jury as to every element of the crime charged is constitutional error, because it relieves the State of its burden under the due process clause to prove each element beyond a reasonable doubt." Br. of Appellant at 25. Reed argues that premeditation is an essential element of the crime of attempted first degree murder because "the only difference between attempted murder in the first degree and attempted murder in the second degree is that the former requires premeditated intent and the latter requires merely intent." Br. of Appellant at 26 (emphasis omitted).

The State argues that the "to convict" instruction was sufficient because it provided the essential elements for attempted first degree murder: (1) that Reed intended to commit first degree murder and (2) that he took a substantial step in committing first degree murder. The State argues that there is no requirement that the elements of first degree murder be included in the "to convict" instruction. We agree with the State.

"'[B]ecause it serves as a yardstick by which the jury measures the evidence to determine guilt or innocence,'" generally the "to convict" instruction must contain all elements of the charged crime. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003) (internal quotation marks omitted) (quoting *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)). But an

[7] Reed proposed such an instruction:

> To convict the defendant of the crime of attempted murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt: 1) that on or about the 26th day of March, 2006, the defendant did an act which is a substantial step toward the commission of murder in the first degree; 2) that the act was done with intent to commit murder in the first degree; 3) that the defendant acted with intent to cause the death of Gary Shilley; 4) that the intent to cause the death was premeditated; and 5) that the acts occurred in the state of Washington.

RP (May 11, 2007) at 14.

erroneous "to convict" instruction may be subject to harmless error analysis. *State v. Carter*, 154 Wn.2d 71, 81, 109 P.3d 823 (2005). If a jury instruction is erroneous but does not relieve the State of its burden to prove every essential element, then the error is harmless. *State v. Brown*, 147 Wn.2d 330, 339-40, 58 P.3d 889 (2002). "[J]ury instructions are sufficient when, read as a whole, they accurately state the law, do not mislead the jury, and permit each party to argue its theory of the case." *State v. Teal*, 152 Wn.2d 333, 339, 96 P.3d 974 (2004). But "a reviewing court may not rely on other instructions to supply the elements missing from the 'to convict' instruction." *DeRyke*, 149 Wn.2d at 910.

II. Premeditation Element

Reed relies on *State v. Goble*, 131 Wn. App. 194, 126 P.3d 821 (2005) to support his argument that the "to convict" instruction was erroneous here. Goble was charged with third degree assault. The jury instructions required the jury to find that Goble knew that the alleged victim was a police officer acting in his official capacity at the time of the assault.[8] *Goble*,131 Wn. App. at 200-02. A separate jury instruction defined knowledge and included the following statement, "'Acting knowingly or with knowledge also is established if a person acts intentionally.'" *Goble*, 131 Wn. App. at 202 (emphasis omitted) (quoting *Goble* CP at 44). The knowledge instruction followed 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 10.02, at 206 (3d ed, 2008) (WPIC). Goble argued that this statement "relieved the State of the burden of proving his knowledge of [the officer's] status at the time of the offense" and that the knowledge instruction, as a whole, was "confusing, misleading, and a misstatement of

[8] Knowledge is not an element of the crime of third degree assault but, because the State did not object to the instruction requiring knowledge, "this instruction became the law of the case and the State was required to prove the elements" as stated. *Goble*, 131 Wn. App. at 201 & n.2.

the law." *Goble*, 131 Wn. App. at 202.

We held that the language stating that intent establishes knowledge "allowed the jury to presume Goble knew [the officer's] status at the time of the incident if it found Goble had intentionally assaulted [the officer]." The majority also held that the instruction "conflated the intent and knowledge elements required under the to-convict instruction into a single element and relieved the State of its burden of proving that Goble knew [the officer's] status if it found the assault was intentional."[9] *Goble*, 131 Wn. App. at 203.

Here, the "to convict" instruction followed 11A WPIC 100.01, at 384 (3d ed. 2008) which states, "A person commits the crime of attempted (fill in crime) when, with intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime." The "to convict" instruction in this case, jury instruction 13, stated:

> To convict the defendant of the crime of Attempted Murder in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 25th day of March, 2006, the defendant did an act which was a substantial step toward the commission of Murder in the First Degree;
>
> (2) That the act was done with the intent to commit Murder in the First Degree; and
>
> (3) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 97; *see also* 11A WPIC 100.02, at 386. Instruction 9 defined first degree murder:

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[9] The dissent in *Goble* argued that "the 'to-convict' assault instruction clearly explained that, in order to convict, the jury had to find beyond a reasonable doubt that Goble knew [the officer] was a law enforcement officer" and, therefore, the "lack of a verbatim recitation of the statutory definition of knowledge did not relieve the State of its burden to prove this element." *Goble*, 131 Wn. App. at 205 (Hunt, J., dissenting).

"A person commits the crime of Murder in the First Degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person." CP at 93. A separate instruction defined premeditation.[10]

Reed argues that the trial court's failure to include the premeditation element in the "to convict" instruction, even though WPIC 100.01 does not require it, constitutes error. We disagree. Unlike *Goble*, the "to convict" instruction did not confuse the intent necessary to prove an attempt with the premeditated intent required to prove first degree murder. Similarly, it did not relieve the State of its burden to prove the elements of attempted first degree murder.

Reed's argument conflates the intent necessary to prove an attempt with that necessary to prove first degree murder. The State did not charge Reed with completed first degree murder; thus, to prove only an attempt to commit first degree murder, the State was not required to prove that Reed acted with premeditated intent to commit murder, only that he attempted to commit murder. Jury instruction 9 defined first degree murder as requiring premeditation and jury instruction 11 defined premeditation. Jury instruction 14 stated, "The defendant is charged in Count One with Attempted Murder in the First Degree. If . . . you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Attempted Murder in the Second Degree." CP at 98. Therefore, the jury had to consider proof of premeditated intent only to determine which degree of attempted

[10] Instruction 11 defined premeditation:

> Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

CP at 95.

murder Reed committed, first degree or second degree attempted murder.

Furthermore, the jury instructions allowed both parties to argue their theory of the case. In closing, both parties emphasized the difference between attempted first degree murder and attempted second degree murder, i.e., that first degree attempt required a showing of premeditated intent but that second degree attempt did not.[11] In deliberating, the jury was required first to consider Reed's guilt under the attempted first degree murder "to convict" instruction and necessarily to determine whether the evidence showed premeditated intent to kill Shilley. If the jury was not convinced of Reed's guilt beyond a reasonable doubt as to attempted first degree murder, instruction 14 required the jury to consider his guilt under the "to convict"

[11] The State emphasized premeditation in its closing arguments:

> [T]he instructions, as a whole, direct your attention at two specific things. That's the "to convict" instruction, one being for attempted murder in the first degree and attempted murder in the second degree. And you'll see from the instructions that the only distinction between those two crimes is the element of premeditation.
>
> Premeditation separates completed murder in the second degree and completed murder in the first degree and also the intent of each of those crimes.
>
> But let's talk about premeditation and intent.
>
> . . . Premeditation focuses on the thought process, thinking and then acting.

RP (May 14, 2007) at 62-63. The State used a baseball metaphor to explain premeditation and then stated, "Premeditation specifically means 'thought over beforehand.' You have the instructions with you. [T]he operative language, the operative thought for premeditation is simply that you thought over about more than a moment in time." RP (May 14, 2007) at 67. The State further discussed premeditation. In all, the record shows at least 15 pages in which the State discussed premeditation in its closing argument.

Reed also focused on premeditation in his closing argument. Reed stated, "The prosecutor is right about one thing in this case, and the whole argument in this case is really about premeditation." RP (May 14, 2007) at 97. "I tell you that this is a tragedy that should not have happened, but it's not attempted murder in the first degree. I submit to you it's attempted murder in the second degree because there was no premeditation." RP (May 14, 2007) at 108. In all, Reed discussed premeditation on at least eight pages of his closing argument.

instruction for attempted second degree murder.[12] The instructions then defined attempted second degree murder, second degree murder, and included the "to convict" for attempted second degree murder.[13]

The "to convict" instruction did not relieve the State of its burden to prove the actual elements of attempted first degree murder. Furthermore, the instructions accurately stated the law and allowed both parties to argue their theory of the case. *Teal*, 152 Wn.2d at 339. Therefore, Reed's argument that the "to convict" instruction was erroneous fails.

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[12] Instruction 14 stated, "The defendant is charged in Count One with Attempted Murder in the First Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Attempted Murder in the Second Degree." CP at 98.

Furthermore, the State ended its closing argument by stating, "If there's any question in your minds or if you have a question about the premeditation aspect of it, it's attempted murder in the second degree." RP (May 14, 2007) at 94.

[13] Instruction 15 defined attempted second degree murder, "A person commits the crime of Attempted Murder in the Second Degree when, with intent to commit Murder in the Second Degree, he or she does any act which is a substantial step toward the commission of that crime." CP at 99. Instruction 16 defined second degree murder, "A person commits the crime of Murder in the Second Degree when with intent to cause the death of another person but without premeditation, he or she caused the death of such person or of a third person." CP at 100. The trial court's second degree attempted murder "to convict" instruction, number 17, stated:

> To convict the defendant of the crime of Attempted Murder in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 25th day of March, 2006, the defendant did an act which was a substantial step toward the commission of Murder in the Second Degree;
>
> (2) That the act was done with the intent to commit Murder in the Second Degree;
>
> (3) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 101.

The balance of this opinion having no precedential value, the panel has determined it should not be published in accordance with RCW 2.06.040.

III. Premeditation: Sufficiency of the Evidence

Reed next argues that the State's evidence was insufficient to prove that he acted with premeditation. He argues that, because "[p]remeditation is a distinct element of the offense of first-degree attempted murder" and because "[t]he element of premeditation is what distinguishes first-degree attempted murder from second-degree attempted murder," the State "was required to show beyond a reasonable doubt that Reed" acted with premeditated intent. Br. of Appellant at 17. Reed argues that "[t]he conviction . . . must be reversed and the case remanded for entry of a conviction on the lesser-included offense" of attempted second degree murder. Br. of Appellant at 24 (emphasis omitted).

A. Standard of Review

In determining the sufficiency of the evidence, we "view the evidence in the light most favorable to the State and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.'" *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). A sufficiency claim "admits the truth of the State's evidence." *State v. Luther*, 157 Wn.2d 63, 77-78, 134 P.3d 205 (2006).

Premeditation is "the deliberate formation of and reflection upon the intent to take a human life"; it must involve more than a moment in time. *State v. Hoffman*, 116 Wash.2d 51, 82, 804 P.2d 577 (1991); RCW 9A.32.020(1).[14] "Premeditation may be shown by circumstantial

[14] RCW 9A.32.020(1) states, "As used in this chapter, the premeditation required in order to support a conviction of the crime of murder in the first degree must involve more than a moment in time."

evidence where the jury's inferences are reasonable and substantial evidence supports the jury's verdict." *State v. Sherrill*, 145 Wn. App. 473, 484, 186 P.3d 1157 (2008), *review denied*, 165 Wn.2d 1022 (2009). "Where the sufficiency of the evidence has been challenged with respect to the element of premeditation, Washington cases hold that a wide range of factors can support an inference of premeditation. Motive, procurement of a weapon, stealth, and method of killing are 'particularly relevant' factors in establishing premeditation." *Sherrill*, 145 Wn. App. at 484-85 (citations omitted) (quoting *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995)).

B. Evidence

The State argues that there was sufficient evidence of premeditation based on motive, timing, and the type of force used.[15] The evidence showed that Reed was driving with a suspended license on the night of the shooting, that he had recently been cited for driving with a suspended license, and that he was in unlawful possession of a gun. Shilley testified that he circled the parking lot before stopping at Reed's car. After he stopped, he waited a few seconds before getting out. The surveillance video provides even more support for a finding of premeditation. First, contrary to Shilley's testimony, it shows that Shilley stopped his vehicle parallel to Reed's Jeep and that Reed approached Shilley's driver's side window. Shilley then exited his vehicle and accompanied Reed to the Jeep's hood area. Further, the video shows that Reed had more than two minutes to observe Shilley—from the time Shilley's patrol car entered the parking lot to the time Reed shot Shilley. Trial testimony approximates the time when Shilley entered the parking lot at 12 minutes 10 seconds past midnight and the time when Shilley started

[15] The State also argues that the lack of spontaneity and Reed's conduct before and after the shooting provide evidence of premeditation. But there is no evidence in the record of "the stealth of [Reed's] conduct immediately before the attack," because the videotape is not clear and Shilley testified that he could not see the shooter before the shooting. Br. of Resp't at 16.

falling to the ground at 14 minutes 55 seconds past midnight. Finally, the evidence was clear that Reed fired two shots at Shilley's head, thereby avoiding areas of his body covered by his bulletproof vest and making it more likely that Shilley would die from the gunshots.

Considering the evidence in the light most favorable to the State, it is sufficient to show that Reed had time to consider his response to Shilley's approach and to form a premeditated intent to kill him. The evidence also demonstrates that Reed had a motive to kill Shilley to avoid arrest for his driving and firearm violations. The evidence shows that Reed considered how best to kill Shilley and that Shilley might be wearing a bulletproof vest. Finally, Reed actually shot Shilley two times in the head, evidence that he intended that the shots be fatal. This is sufficient evidence that Reed acted with premeditation to kill Shilley and Reed's challenge fails.

III. Photographic Identification

Reed also argues that "the trial court violated [his] right to due process by failing to suppress the unreliable identification resulting from an impermissibly suggestive procedure." Br. of Appellant at 34 (emphasis omitted). He argues that, "[a]lthough Trooper Olson was shown photographs of two different people, it was effectively a one-person photo showup . . . because [ ] Olson knew the suspect was African American, and the only African American shown was Reed." Reed further argues that the trial court's determination that "there was no risk of irreparable misidentification" was erroneous. Br. of Appellant at 36.

A. Standard of Review

An out-of-court photographic identification procedure violates due process if it was based on suggestive factors that "'give rise to a very substantial likelihood of irreparable misidentification.'" *State v. Hilliard*, 89 Wn.2d 430, 438, 573 P.2d 22 (1977) (quoting *Simmons*

v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968)). To establish a violation, the defendant bears the burden of showing that the identification procedure was impermissibly suggestive. *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). A suggestive procedure is "one that directs undue attention to a particular photo." *State v. Eacret*, 94 Wn. App. 282, 283, 971 P.2d 109 (1999). "If [the defendant] proves the procedure was suggestive, the court then considers, based upon the totality of the circumstances, whether the procedure created a substantial likelihood of irreparable misidentification." *Vickers*, 148 Wn.2d at 118.

B. Not Impermissibly Suggestive

Here, the evidence shows that Olson saw a young black male in a red SUV before he knew that a red Jeep driven by a black male was involved in a shooting. At the shooting scene, he told the other officers and detectives that he had just seen a young black male in a red SUV. At that point, the officers showed Olson photographs, one photograph of the registered owner and three or four photographs of the last person associated with the vehicle. The first individual was a "very light skin black or black mixed with Asian" and the second was a black male. RP (May 14, 2007) at 23.

Because there were photographs of two different people, Reed cannot show that the identification was impermissibly suggestive. Even if it was suggestive, it did not create a substantial likelihood of irreparable misidentification because there was other significant evidence that showed Reed's connection with the red Jeep: his recent prior citation, his fingerprints, and Cihla and her mother's statements. Therefore, Reed's argument fails.

IV. Exceptional Sentence

Reed further argues that "the trial court violated the [Sentencing Reform Act] and the

Sixth Amendment by imposing an exceptional sentence based on facts that (a) were not proved to a jury beyond a reasonable doubt, and (b) are not among the exclusive list of factors that may support an exceptional sentence under the statute." Br. of Appellant at 40. He argues that the improper factors were: "[1]. The shooting was completely unprovoked. [2]. The defendant has shown [no] remorse in court. [3]. The shooting was carried out because the victim was a police [officer]." Br. of Appellant at 40 (first alteration in original). Though the jury found that "Reed knew the victim was a police officer acting in the line of duty," Reed argues that the trial court based its decision to impose an exceptional sentence in part on facts not proved to the jury beyond a reasonable doubt. Br. of Appellant at 40. The State concedes that the trial court improperly considered three additional factors in imposing the exceptional sentence and asks us to remand for resentencing. Our own review of the record supports the State's concession.

If a trial court relies on both proper and improper aggravating factors in sentencing a defendant, "remand for resentencing is necessary where it is not clear whether the trial court would have imposed an exceptional sentence on the basis of only" the proper factors. *State v. Gaines*, 122 Wn.2d 502, 512, 859 P.2d 36 (1993). We remand for resentencing based only on the factors the jury considered.

V. Statement of Additional Grounds for Review (SAG)[16]

Finally, Reed argues in his SAG that his counsel was ineffective in violation of his Sixth Amendment and Washington Constitution article I section 22 rights. He also argues that the trial court miscalculated his offender score.

A. Ineffective Assistance of Counsel

[16] RAP 10.10.

Reed argues that his trial counsel was ineffective when, during closing arguments, he conceded that Reed shot Shilley. He argues that his "trial counsel's performance was deficient [when he] implicated . . . to the jury that Mr. Reed was guilty of shooting an officer contrary to Mr. Reed declaring his innocence and against Mr. Reed's directives." He argues that this ineffective assistance "did effect [sic] the outcome of [his] trial." SAG at 2.

To prevail on a claim of ineffective assistance of counsel, an appellant must prove both: (1) that his attorney's performance was deficient and (2) that this deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is that which "falls below an objective standard of reasonableness." *State v. Horton*, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). We begin with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. Counsel's legitimate trial strategy or tactics cannot provide a basis for a claim of ineffective assistance of counsel. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To establish prejudice, the defendant must show that counsel's performance was so inadequate that there is a reasonable probability that, given competent counsel, the result would have differed, thereby undermining our confidence in the trial outcome and requiring that it begin anew. *Strickland*, 466 U.S. at 694.

Where evidence of guilt is overwhelming and there is no reason to believe that any juror doubts it, conceding guilt on that count during closing arguments can be a sound trial tactic. Even where a defendant has pleaded not guilty to a particular offense, conceding guilt on that count during closing arguments "'can be a sound tactic when the evidence is indeed overwhelming . . . and when the count in question is a lesser count, so that there is an advantage to be gained by

winning the confidence of the jury.'" *State v. Silva*, 106 Wn. App. 586, 596 & n.37, 24 P.3d 477 (2001) (quoting *Underwood v. Clark*, 939 F.2d 473, 474 (7th Cir. 1991)). In such a case, "An attorney need not consult the client before making such a tactical move." *Silva*, 106 Wn. App. at 596. If the concession is a matter of trial strategy or tactics, it is not ineffective representation. *Silva*, 106 Wn. App. at 599.

Here, Reed pleaded not guilty to attempted first degree murder and first degree unlawful possession of a firearm. During closing arguments, Reed's counsel stated the following:

> The prosecutor is right about one thing in this case, and the whole argument in this case is really about premeditation. That's what it really is about. If I told you that they don't have identity, if I said, well, I don't think they've proven that beyond a reasonable doubt, I would lose credibility with you.
>
> Mr. Reed probably was the one beyond a reasonable doubt. And that's a pretty high burden of proof, but beyond a reasonable doubt he's the one who shot Officer Shilley that morning around midnight. It would be foolish, and you might even be angry if I said that's not what happened. And we've stipulated that he has a prior record, that he has a prior conviction, and there was a firearm that was involved. He shouldn't have had a gun. He's obviously guilty of a felon in possession of a firearm, unlawful possession of a firearm.

RP (May 14, 2007) at 97.

In conceding that Reed shot Shilley, Reed's counsel was acknowledging the overwhelming evidence showing that Reed was the shooter. He clearly employed a reasonable trial tactic in attempting to convince the jury that it should not find premeditation and should convict on the lesser offense of attempted second degree murder, rather than on the more serious offense of attempted first degree murder. Reed's counsel's concessions on the lesser offenses (included and otherwise) were focused on gaining or maintaining credibility with the jury to support his argument on the lack of premeditation to procure a lesser conviction for Reed; thus, his counsel's conduct constituted legitimate trial tactics. Therefore, Reed's claim of ineffective assistance of

counsel fails.

B. Offender Score

Reed argues that the trial court miscalculated his offender score because he had three prior felony convictions rather than four.

At sentencing, the State argued that Reed's offender score was four. It argued that, due to Reed's three prior felonies and his "other current offense for the unlawful possession of firearm charge," Reed had four felony offenses. RP (June 1, 2007) at 5. Reed stipulated to the prior criminal history as presented by the State. He also agreed with the State's calculation of his offender score.

Furthermore, it is permissible for a trial court to include another current offense as part of the offender score calculation. RCW 9.94A.525(1);[17] RCW 9.94A.589(1)(a).[18] Including Reed's current conviction for unlawful possession of a firearm, Reed's offender score for sentencing on the attempted first degree murder conviction was four. The trial court, therefore, properly calculated his offender score and this claim also fails.

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[17] RCW 9.94A.525(1) states:

> A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

[18] RCW 9.94A.589(1)(a) states:

> [W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

We affirm the attempted first degree murder conviction but remand to give the sentencing court an opportunity to either reimpose the exceptional sentence based on proper aggravators or to reduce Reed's sentence.

Van Deren, C.J.

We concur:

Armstrong, J.

Hunt, J.